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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON. Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR, in his official capacity as the Secretary of the United States Department of Health and Human Services, Defendants.	Case No. 2:20-CV-01105-JLR **RESPONSE TO SHOW CAUSE ORDER**

INTRODUCTION

On August 18, 2020, defendants submitted a "Notice of Decision in *Walker v. Azar*, No. 20-cv-0234 (E.D.N.Y.)" *See* ECF No. 67. That Order stayed and preliminarily enjoined defendants from enforcing nationwide the 2020 Rule's repeal of the regulatory definition of "on the basis of sex." *Walker v. Azar*, No. 20-cv-2834-FB, ECF No. 23, at 25–26 (E.D.N.Y. Aug. 17, 2020). In light of that Order, plaintiff here cannot establish irreparable harm as to its challenge to the 2020 Rule's decision not to define "sex" or "on the basis of sex." Plaintiff's motion for a preliminary injunction should be denied in that respect.

In addition, the New York Order did not address the 2020 Rule's clarification of the application of Title IX's religious exemption under Section 1557 or the 2020 Rule's scope of entities covered by Section 1557. Accordingly, that Order does not affect any analysis here with respect to those provisions. For the reasons defendants explained in their previous briefing, plaintiff's motion for a preliminary injunction should also be denied as to its challenges to them. Indeed, defendants respectfully submit that the New York Order's conclusion that the plaintiffs there have standing to challenge the 2020 Final Rule is predicated on a misinterpretation of the relevant law. This Court should not repeat those errors.

ARGUMENT

I. PLAINTIFF CANNOT ESTABLISH IRREPARABLE HARM AS TO THE 2020 RULE'S FAILURE TO DEFINE "SEX" OR "ON THE BASIS OF SEX" IN LIGHT OF THE NEW YORK ORDER

A showing of irreparable harm is of course "necessary" to obtain preliminary injunctive relief. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). In light of the New York Order, plaintiff cannot make that showing. Indeed, in staying and "enjoin[ing] the defendants from enforcing the repeal" of "the 2016 definition of discrimination on the basis of sex," New York Order at 25–26, the New York court provided plaintiff here with all of the relief it seeks in its preliminary injunction motion as to this provision (to the extent that relief is possible in light of *Franciscan Alliance*). The requirement that a party show irreparable harm restricts this Court's authority to enter a duplicative injunction. Because plaintiff cannot show that it will be irreparably harmed in the absence of yet another injunction from this Court, the Court should deny

plaintiff's motion for a preliminary injunction *without prejudice* as to plaintiff's challenge to the 2020 Rule's decision not to define "on the basis of sex," or, at the very least, stay its consideration of that aspect of the motion. *See, e.g.*, *Pars Equality Ctr. v. Trump*, No 17-cv-0255-TSC (D.D.C. Mar. 2, 2018), ECF No. 143 (staying request for preliminary relief because another nationwide injunction "calls into question whether the harms Plaintiffs allege are actually imminent or certain—a prerequisite for a preliminary injunction"); *Washington v. Trump*, 2017 WL 4857088, at *6 (W.D. Wash Oct. 27, 2017) (Robart, J.) ("[T]he Hawaii federal district court's injunction already provides Plaintiff States with virtually all the relief they seek in their TRO motion."); *Washington v. Trump*, 2017 WL 1050354, at *4 (W.D. Wash Mar. 17, 2017) (Robart, J.) ("In light of the state of the proceedings in the federal district court in Hawai'i, the court finds that any prejudice caused by a delay in the court's resolution of Plaintiff's motion will be minimal—if there is any at all."); *Hawai'i v. Trump*, 233 F. Supp. 3d 850, 853 (D. Haw. 2017) ("[T]he Western District of Washington's nationwide injunction already provides the State with the comprehensive relief it seeks in this lawsuit. As such, the State will not suffer irreparable damage.").

Plaintiff might argue it could suffer irreparable harm in the future, if any appeal by the government results in vacatur of the preliminary injunction. But an injury that is expressly contingent on a future event is, by definition, not an imminent, irreparable injury. *See Henke v. Dep't of Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) ("Injury that is hypothetical or speculative does not [give] rise to . . . irreparable harm."); *accord. In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm.").

Accordingly, the Court should deny plaintiff's motion to preliminarily enjoin HHS's decision not to define "on the basis of sex" in the 2020 Rule without prejudice to plaintiff filing a renewed motion if the New York injunction is later vacated. At a minimum, the Court should stay its consideration of this aspect of plaintiff's motion.

II. THE NEW YORK ORDER DID NOT STAY OR ENJOIN THE 2020 RULE'S INCORPORATION OF TITLE IX'S RELIGIOUS EXEMPTION OR ITS CONSTRUCTION OF THE SCOPE OF COVERED ENTITIES

The New York Order has no impact on the 2020 Rule's explicit clarification of the application of Title IX's religious exemption under Section 1557 or the 2020 Rule's scope of entities covered by Section 1557, and those portions of the 2020 Rule are now in effect. The New York Order "stay[ed] the repeal of the 2016 definition of discrimination on the basis of sex" and preliminarily enjoined defendants from enforcing that repeal, Order at 25; it did not stay or enjoin any other provision of the 2020 Rule. In fact, the plaintiffs in the New York case did not challenge any other provision of the Rule. This Court requested that "[t]he parties should specifically address whether the *Asapansa-Johnson Walker* court's statement that it 'preliminarily enjoins HHS from enforcing the repeal' . . . impacts the court's authority to consider HHS's standing arguments or the merits of Washington's motion for a preliminary injunction.'" ECF No. 68 at 3 (quoting New York Order at 25–26). But there is no indication that the referenced statement is referring to anything other than "the repeal of the 2016 definition of on the basis of sex"—and the accompanying definitions of "gender identity" and "sex stereotyping"—discussed in the prior sentences of that paragraph and throughout the court's decision. *See* Order at 25-26.

III. ERRORS IN THE NEW YORK COURT'S ANALYSIS FURTHER DEMONSTRATE THAT PLAINTIFF HERE LACKS STANDING TO CHALLENGE THE 2020 RULE

As this Court has noted, "the private plaintiffs in *Asapansa-Johnson Walker* stand in different shoes than Washington does in this case." ECF No. 68 at 3 n.1. First, *Asapansa-Johnson Walker* did not involve a challenge to the 2020 Rule's provisions relating to Title IX's religious exemption and the scope of covered entities under Section 1557. Second, the *Asapansa-Johnson Walker* plaintiffs were two individual transgender New Yorkers claiming fear of future stigmatic harm stemming from the 2020 Rule. By contrast, plaintiff in this case, a State, has not alleged fear of future stigmatic harm stemming from the 2020 Rule, and it is doubtful that it could. But plaintiff does rely on speculative fear of future stigmatic harm to Washingtonians as part of its conjecture that this harm might trickle up to one day affect its tax revenue and other programmatic costs. And it relies on this conjectural chain of inferences to establish harms stemming from the 2020 Rule's provisions that were not at issue in *Asapansa-Johnson Walker*. In short, plaintiff here and the

Asapansa-Johnson Walker plaintiffs are not similarly situated. And although the New York Court's preliminary injunction does not itself necessarily preclude plaintiff's standing, the New York Court's erroneous standing analysis demonstrates why plaintiff lacks standing.

Plaintiff must demonstrate standing as to each provision of the 2020 Rule it seeks to challenge. In adjudicating those standing issues, this Court should avoid making mistakes similar to those made by the New York court. In particular, the New York Order is not persuasive because of its erroneous application of standing jurisprudence. *First*, in support of its view that two individual plaintiffs had standing to challenge the 2020 Rule, the New York court relied on the Supreme Court's opinion in *Heckler v. Mathews*, 465 U.S. 728 (1984), suggesting that any stigmatizing injury, regardless of whether it is concrete or particularized, supports Article III standing. New York Order at 15. But the New York court misreads *Mathews*. The Supreme Court's "cases make clear . . . that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by . . . challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Mathews*, 465 U.S. at 739–40). If "abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular . . . groups against which the Government was alleged to be discriminating[,] . . . [but] Constitutional limits on the role of federal courts preclude such a transformation." *Id*. at 755–56. As the Second Circuit has explained:

> *Mathews* did not change the requirement that a plaintiff demonstrate an injury in fact in order to establish Article III standing. A plaintiff still must show that he was denied an actual, rather than conjectural, benefit (or that he sustained some other actual harm) in order to challenge a government action in federal court. In *Mathews*, the denial of a tangible benefit was never in dispute. The plaintiff would have been eligible to receive extra Social Security payments (an extra $153.30 in the mail every month, to be precise) had the amendment applied the same eligibility criteria to men and women. . . . Later Supreme Court cases have reaffirmed that a plaintiff must prove that he has personally suffered a concrete and particularized injury . . .
>
> The plaintiff in *Mathews* was a long-tenured civil servant who had taken affirmative steps to establish his eligibility for the extra Social Security benefits he sought, and indisputably would have been entitled to receive them were it not for the discriminatory amendment being challenged.

MGM Resorts Int'l Global Gaming Development, LLC v. Malloy, 861 F.3d 40, 49–50 (2nd Cir. 2017). Here, plaintiff has to go one step further because it is a state alleging injury as a result of

purported injury to individuals—so there is at least one more link in the chain (and really several more). *See, e.g.*, ECF No. 64 at 5 (claiming plaintiff has standing to challenge religious exemption because "DOH expects demand for its Office of Infectious Diseases to increase as stigma and fear of LGBTQ discrimination increases as a result of the Final Rule").

Second, the New York Court concluded that the plaintiffs' "past discrimination in receiving healthcare . . . alone constitutes an injury in fact." New York Order at 14–15. But when plaintiffs seek injunctive relief, they must "show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury." *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 153 F. Supp. 3d 1291, 1312 (W.D. Wash 2015) (citation omitted). 153 F. Supp. 3d 1291, 1312 (W.D. Wash 2015) (citation omitted). Aside from noting the mere fact that those plaintiffs might require medical care in the future, the New York Court did not explain *why* those plaintiffs' past episodes of discrimination meant that future ones were certainly impending, much less why any future discrimination would would be caused by the 2020 Rule, or would likely be remedied by enjoining the 2020 Rule. Plaintiff here likewise has not raised the type of past evidence that establishes certain future injury. *Cf. Microsoft Corp. v. U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 901-02 (W.D. Wash 2017) (plaintiff "sufficiently alleges a likelihood of similar harm in the future" by the government continuing to seek certain purportedly illegal orders when "over a 20-month period preceding [the] lawsuit, the Government sought and obtained 3,250 orders"). Plaintiff relies on past discrimination by third parties—not defendant. For example, one declarant describes "one respondent" to a survey who responded that "they had several experiences of incompetence by a healthcare professional in the area and in other states, mostly related to genetic and surgical history." Maroon Decl. ¶ 11 (¶¶ 7, 15 cited in ECF No. 64 at 5 to support arguments that plaintiff is harmed by the 2020 Rule's provisions relating to Title IX's religious exemption).

Third, nowhere does the New York Order address the effect of New York's own antidiscrimination law—including regulations with terms identical to the 2016 Rule—on the *Asapansa-Johnson Walker* plaintiffs' standing. Given that Washington State law includes similar anti-discrimination provisions that do not include a religious exemption and whose scope may be

more expansive than that of Section 1557 under the 2020 Rule, this Court should not replicate that error. *See* ECF No. 56 at 7.

Fourth, the New York Court relied on *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) to disregard serious causation problems with plaintiffs' theory of standing. But defendants have already explained why *Department of Commerce* is inapposite. *See* Defs. Supp. Mem. at 6, ECF No. 65. There, a State had standing because a new census question would have the "predictable effect" of lowering census response rates, which would almost inevitably result in the State's losing federal funds allocated on the basis of state population. 139 S. Ct. at 2565-66. Plaintiff's theory of injury stemming from the 2020 Rule's provisions relating to Title IX's religious exemption or the scope of entities covered by Section 1557 is based on a far more attenuated causal chain that is far from "predictable." *Cf. United Transp. Union v. ICC*, 891 F.2d 908, 912 n. 7 (D.C. Cir. 1989) ("That a court believes itself bound to credit allegations of future injury that are firmly rooted in the basic laws of economics does not compel [courts] to accept allegations founded solely on the complaint's speculation.").

Finally, the New York Order mischaracterizes HHS's own conclusions to find certainty where none exists. The New York Court suggests that HHS "stat[ed] that some [healthcare providers] *would* 'revert to the policies and practices they had in place before the agency actions that created confusion regarding Title IX's definition of discrimination on the basis of sex.'" Order at 17 (quoting 84 Fed. Reg. 27,876) (emphasis added). But HHS did not find that this "would" happen. HHS said merely that it "anticipates that, as a result of the proposed rule, some—but not all—covered entities *may* revert to the policies and practices they had in place before the" 2016 Rule. 84 Fed. Reg. 27,876 (emphasis added). As defendants have explained, HHS's own speculation about the actions of third parties cannot form the basis of a plaintiff's standing. Defs. Supp. Mem. at 4–5. Moreover, HHS's speculation concerned the rule as a whole; it did not address any purported impact specific to the 2020 Rule's provisions relating to Title IX's religious exemption or the scope of covered entities under Section 1557. And in light of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), whether the 2020 Rule's decision not to define "on the basis of sex" is likely to result in covered entities reverting to policies or practices they had in place before

the 2016 Rule is even more speculative. *See Clapper v Amnesty Intern. USA*, 568 U.S. 398, 414 (2013) (no standing where plaintiffs "can only speculate as to whether [a] court will" make a certain conclusion).

In sum, plaintiff lacks standing to challenge the three provisions of the 2020 Rule at issue in this case. Indeed, the 2020 Rule's changes that have not been enjoined by the New York court are now in effect and plaintiff has not pointed to a single entity that has changed any policy affecting any Washingtonian as a result. For the foregoing reasons, nothing in the New York Order impacts the standing analysis in this case.

Dated: August 26, 2020.

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